intended, the 2002 general elections for House seats were the least competitive in United States history. Richard H. Pildes, Foreword: *The Constitutionalization of Democratic Politics*, in *The Supreme Court, 2003 Term*, 118 Harv. L. Rev. 28, 62 (2004); *see also* Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 477 (2004).

Finally, the dangers inherent in partisan gerrymandering are particularly acute where, as in this case, a State engages in mid-decade redistricting even though a lawful district plan is already in effect. Until the mid-decade redistricting at issue here, and recent mid-decade redistricting by Colorado and Georgia, States normally drew new district lines only once per decade after a new census was taken, even though partisan considerations played a role in the placement of those lines. Although such gerrymanders often skew the first election after they are implemented, their effects tend to wane over the life of the ten-year cycle.[3] A key reason is that populations within a district, and the politics of those populations, change unpredictably over time. *See Karcher* v. *Daggett*, 462 U.S. 725, 732 (1983) ("[T]he well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed."). So long as redistricting is conducted only once per decade, therefore, members of Congress seeking to represent such districts have strong incentives to accommodate those changes in their voting records. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 771 (2004); *see also People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1242 (Colo. 2003) (strik-

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[3] *See, e.g.*, Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 10 (2005) (the effects of partisan gerrymandering are "unlikely to last very long, much less the entire decade until the post-census reapportionment"); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Efforts in Congressional Elections in the 1970s and 1980s*, 54 J. Pol. 565, 571 (1992) (summarizing studies demonstrating diminution of effect of partisan gerrymandering over the ten-year cycle).

ing down Colorado redistricting plan enacted in the middle of a decade on state constitutional grounds).

The party in control of a state legislature can undermine those incentives by redrawing district lines more often. *See Salazar*, 79 P.3d at 1242 (if district lines changed more than once a decade, "a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents"). Start-of-decade redistricting happens randomly from a political perspective—that is, parties cannot choose to redistrict at the moment when it helps them the most. But when States reapportion districts more frequently, parties in power have the means to lock in gains whenever possible. *See id.*; *see also Vieth*, 541 U.S. at 364 (Breyer, J., dissenting). Of course, this means that parties could—and, in most cases, would—redistrict every time they regained control of state legislatures, leading to greater polarization, less compromise, and less responsiveness to the body politic.

II. Claims That A State Legislature Lacked Any Non-Partisan Basis For A Threshold Decision To Engage In Redistricting Are Justiciable And State A Clear Constitutional Violation

Despite their disagreements, all nine Justices in *Vieth* agreed that, at some point, naked partisanship in redistricting decisions can so severely damage the integrity of the political process as to violate the Constitution. The plurality acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles" and agreed with Justice Kennedy and the dissenters that "an excessive injection of politics is unlawful." 541 U.S. at 292-293 (emphasis and internal quotation marks omitted). The question here is whether the courts can and should intervene to protect the political process where a state government demonstrates no neutral, non-partisan justification for a decision to engage in redistricting in the first place. The answer is yes. Judicial oversight of such a decision is plainly subject to judicially discoverable and manageable standards, and indeed is critical to our democracy.

A. Appellants' Excessive-Partisanship Claim Is Justiciable

The *Vieth* plurality concluded that all excessive-partisanship challenges to a redistricting scheme are nonjusticiable under the political question doctrine on the theory that they inevitably present "a lack of judicially discoverable and manageable standards." 541 U.S. at 277-278 (plurality opinion) (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). A majority of the Court, however, rejected that conclusion. As Justice Kennedy observed: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312 (Kennedy, J., concurring in the judgment). "If that is so," he added, "we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive"—and that the courts would properly invalidate the enactment. *Id.* Each of the four dissenting Justices likewise affirmed that excessive-partisanship claims can be susceptible to judicially manageable rules. *See id.* at 323-325 (Stevens, J., dissenting); *id.* at 343-344 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

This case likewise presents basic questions about the justiciability of excessive-partisanship challenges to redistricting decisions. In one key respect, however, this case is more obviously susceptible to judicial resolution. That is not just because these plaintiffs claim that naked partisanship formed the sole basis—rather than, as in *Vieth*, the "predominant" basis—of the State's redistricting decision. *See* J.S. 23-24.[4] The reason, more fundamentally, is that the type of electoral decision challenged here—a threshold decision to redistrict *at all*—is more readily amenable to judicial scru-

[4] As used in this brief, "J.S." and "J.S. App." refer to the Jurisdictional Statement and its Appendix in No. 05-276.

tiny than the precise details of where district lines should be drawn once that decision has been made.

For present purposes, "excessive partisanship" challenges to redistricting decisions can be divided into two broad categories. The first consists of challenges to a State's yes-or-no decision to engage in redistricting of any kind. The second consists of challenges to the particulars of whatever new districting scheme a State adopts. We will call these, respectively, "step one" and "step two" challenges.

Most excessive partisanship cases fall in the latter category: they challenge the particulars of the lines drawn rather than the threshold decision to redraw lines. *Vieth* was such a case. The plurality concluded there that step two challenges necessarily elude resolution through judicially manageable rules because the details of district line-drawing are subject to limitless variation and will inevitably reflect a combination of many different considerations, some partisan and some not. *See, e.g.*, 541 U.S. at 290 (plurality opinion) (analysis of excessive-partisanship challenges would "cast[] [courts] forth upon a sea of imponderables"); *see also id.* at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide.").

Although the League disagrees with the plurality's conclusion that step two challenges are inherently nonjusticiable, the Court need not revisit that issue here, for this is a step one challenge. What appellants contest is not the State's choice of one among infinitely many districting options, but the State's threshold decision—one of two options in a binary choice—to conduct *any redistricting at all* even though a valid districting scheme was already in place. Appellants claim that the State, by its own admission, made that threshold decision solely to disadvantage a disfavored political association and not for any non-pretextual neutral reason. That claim, which presents none of the line-drawing details present in *Vieth*, is justiciable.

On the merits, appellants argue that partisan gain was the State's only objective in 2003 when it altered the lawful

districting plan adopted by the district court in 2001. As they observe, the district court found in 2004 that "the *single-minded* purpose of the Texas Legislature . . . was to gain partisan advantage" for one party at the expense of another. J.S. App. 85a. In particular, "[t]he newly dominant Republicans . . . decided to redraw the state's congressional districts *solely* for the purpose of seizing between five and seven seats from Democratic incumbents." *Id.* at 88a-89a (emphasis added and alteration in original). Appellants further argue (J.S. 25-26) that this decision to maximize Republican gains in 2003 cannot be justified as a neutral attempt to undo an unlawful Democratic gerrymander in 1991. *Cf.* J.S. App. 20a-22a. They note that the intervening 2001 plan began, in the words of the district court itself, with "a blank map of Texas" (*id.* at 206a), produced a scheme that, as time eroded the influence of incumbency, was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state" (*id.* at 209a), and "reflected the growing strength of the Republican Party in Texas, with 20 of 32 seats offering a Republican advantage" (*id.* at 85a). In any event, whether or not the Court accepts appellants' factual allegations on these points, the allegations themselves plainly establish the justiciability of this case.

B. Appellants' Excessive-Partisanship Claim States A Constitutional Violation

Under any level of equal protection scrutiny, the government must articulate *some* neutral, non-pretextual objective for any decision it makes.[5] Disadvantaging a disfavored

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[5] *See, e.g., Romer* v. *Evans*, 517 U.S. 620, 623 (1996) (equal protection clause "state[s] a commitment to the law's neutrality"); *Lehr* v. *Robertson*, 463 U.S. 248, 265 (1983) ("The concept of equal justice under law requires the State to govern impartially."); *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 (1979) (same); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption,

political group in the electoral process—or favoring a particular political group—is, by definition, not a neutral objective, and standing alone it cannot justify governmental action. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634-635 (quoting *Department of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)) (ellipsis and emphasis in original); *see also Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Indeed, as discussed in Part I, districting decisions that reflect a bare desire to benefit one party to the detriment of another are highly corrosive to our democratic system and, in particular, to the unique constitutional role assigned to the House of Representatives.

That said, the mere fact that some or all legislators harbored a partisan purpose is not enough to invalidate a decision to engage in redistricting. If, in the absence of partisan objectives, a State would have engaged in redistricting anyway for non-pretextual neutral reasons, the fact that the majority party favored redistricting for partisan advancement as well would not necessarily invalidate the redistricting decision at step one. A State might have any number of neutral reasons for deciding to redistrict. For example, a State may need to respond to a new census showing shifts in population or altering the number of representatives. Or the State may need to respond to a court order invalidating the existing plan. In either case, a neutral rationale adequately and independently justifies the threshold decision to engage in redistricting, and that decision would almost certainly survive step one scrutiny.

But partisan considerations do not themselves serve any legitimate state interest and thus cannot by themselves justify a decision to engage in redistricting. Such a decision

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the assumption can no longer serve as the basis for presuming constitutionality." (footnote omitted)).

is therefore invalid if the State would not have made it but for the partisan objective and if, as intended, it harms the disfavored political party.[6] As the *Vieth* plurality recognized, "an excessive injection of politics in redistricting is unlawful." 541 U.S. at 293. And no governmental action can be more "excessively" partisan than one that would not have been undertaken at all but for a desire to favor one political association over another.

As discussed, enforcing the constitutional prohibition on such governmental actions, particularly in the context of a step one challenge, requires no recourse to judicially unmanageable rules. More generally, courts are uniquely competent institutions to adjudicate such matters. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226 (emphasis added). The fact that this dispute involves a challenge to a districting plan makes it, if anything, *more* appropriate for judicial resolution than many types of challenges to substantive legislation unrelated to the electoral process.

"[V]oting cases ... involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives," with their "obvious vested interest[s]." John Hart Ely, *Democracy and Distrust* 117 (1980). For that reason, it is not only possible, but essential, for the courts to craft judicially manageable rules to police the integrity of the electoral process. With rare exceptions, voters cannot themselves serve as an effective check merely by threatening to unseat incumbents for acting on that incentive. The incumbents can continuously

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[6] *See generally Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001); *cf. Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) (defendant in mixed-motive employment discrimination case "prevails by showing that it would have reached the same decision in the absence of the protected conduct"); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977) (same).

redraw district boundaries to mitigate that threat, *see Vieth*, 541 U.S. at 364 (Breyer, J., dissenting); few potential challengers within the majority party could credibly promise to disadvantage their party and ultimately their own political prospects by drawing district lines in a more non-partisan manner; and decisions to redistrict will rarely if ever stir voters as much as the substantive political debates of the day. As a result, courts will be the only effective check on partisan abuses in the redistricting process. "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage." Ely, *supra*, at 117.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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LEAGUE OF LATIN AMERICAN CITIZENS, *et al.*,

TRAVIS COUNTY, TEXAS, *et al.*,

EDDIE JACKSON, *et al.*,

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Interest of *Amicus Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of participation in efforts to eradicate barriers to the full political participation of African Americans in and to eliminate racial discrimination from the political process. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g., Ga. v. Ashcroft*, 539 U.S. 461 (2003); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); and *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, LDF actively supported the legislative reversal of the decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which was achieved through the 1982

[1]Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

amendments to Section 2 of the Voting Rights Act of 1965. *See* VOTING RIGHTS ACT: HEARINGS ON S. 53, S. 1761, S. 1975, S. 1992 AND H.R. 3112 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess. 1251-68 (1982) (statement of Julius L. Chambers, President of the NAACP Legal Defense and Educational Fund, Inc.).

Because of its longstanding commitment to the elimination of racial discrimination in the political process and the protection of the voting rights of African Americans, LDF has an interest in these appeals, which present important issues concerning the interpretation and application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Introduction and Summary of Argument

The four post-2000 Census Texas congressional redistricting cases consolidated before this Court arise from a set of facts that is at once common and extraordinary. The underlying facts are common because they detail a redistricting story in which a partisan majority used its control of the process to extract maximum political advantage. This is unremarkable. Experience teaches that both the Democratic and Republican parties aggressively pursue their partisan motives in redistricting where they can control the process.

The story is extraordinary, however, because the naked partisan objectives of the redistricting process at issue were laid bare by the unusual timing of the line redrawing, and by the means that the proponents employed to achieve their partisan ends. A court-drawn and -approved congressional districting plan fashioned after the 2000 Census, and described as tilting in favor of the Republican party that controls Texas, was deemed not to tilt far enough in an era when computer

innovations have enhanced the possibilities for highly effective gerrymandering. Minority party Democratic legislators fled the state they were elected to serve in an effort to avoid a vote on and passage of the plan that was ultimately passed. Proponents of the "re-redistricting" plan enlisted a federal agency to aid in obtaining the return of the departed state legislators, and longstanding procedural rules of the legislature were nearly abrogated to facilitate passage of the partisan plan.

This set of underlying facts — manifesting familiar redistricting opportunism as well as extraordinary proceedings and techniques — presents this Court for the second time in as many years with the central question whether partisan distortions of the redistricting process can rise to the level of Constitutional injury.

The political aspects of the case have received considerable attention, and any rule(s) that the Court may choose to fashion in service of constitutional guarantees could provide important guidance in establishing the outer bounds to which elected officials may reach in their efforts to place their own, and their parties', interests above those contemplated by the public and Constitutional purposes of redistricting.

Because the cases consolidated before this Court arose in Texas, a state that reflects many of the prevailing demographic patterns and population trends in the United States, there is another — perhaps less discussed but no less important — set of questions that run through the jurisdictional statements. These are questions about minority voting rights and the degree to which contemporary partisan redistricting battles are at tension with well-established legal principles that protect minority citizens' access to the political process and their right to elect candidates of their choice. Not only do partisan manipulations raise questions about the limits of